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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957.

No. 85.

CITIES SERVICE GAS COMPANY, a Corporation,
Appellant,

vs.

STATE CORPORATION COMMISSION OF KANSAS, MARION BEATTY, Chairman, RICHARD C. BYRD and HARRY G. WILES, As Members of Said Commission, and Their Respective Successors in Office, *Appellees.*

ON APPEAL FROM THE JUDGMENT OF THE SUPREME COURT OF THE STATE OF KANSAS.

APPELLEES' BRIEF IN REPLY TO BRIEF FOR THE FEDERAL POWER COMMISSION AS AMICUS CURIAE.

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APPELLEES' BRIEF IN REPLY TO BRIEF FOR THE FEDERAL POWER COMMISSION AS AMICUS CURIAE.

The brief of the Federal Power Commission as *amicus curiae* reaches the issues of this case at only one point (pp. 31-34). Section F of this brief demonstrates the irrelevance of the remainder of the Federal Power Commission brief.

A. The Natural Gas Act Regulates Sales in Interstate Commerce As Contrasted with Sales Affecting Interstate Commerce.

It is first asserted that there is a conflict between the Kansas order and the regulations of the Federal Power Commission (p. 31). This assertion is supported by an argument that the Kansas order has a "direct and substantial *effect*"[1] "upon sales of natural gas in interstate commerce." (p. 31). But the Natural Gas Act (15 U. S. C. A. 717, *et seq.*) regulates sales *in* interstate commerce as contrasted with sales *affecting* interstate commerce.[1]

B. Congress Occupied Only a Limited Field in Which the Supreme Court Had Held (Pre-1938) That the States May "Not Act" by Reason of the Commerce Clause.

This argument is followed by an argument on the succeeding page that "there is no question of accommodation of state and federal regulatory functions" and that the state authority must yield, citing *Hines* v. *Davidowitz*, 312 U. S. 52, a case involving a statute requiring registration of aliens, a matter which Congress had manifested a purpose to control through "one uniform national registration system" and involving a field where states did not have "concurrent power" (312 U. S. at 74, 68). But it was not necessary to go so far afield. Nor does it seem to us that the Federal Power Commission was justified in ignoring the decisions of this court interpreting the Natural Gas Act.

In *Public Utilities Co.* v. *United Fuel Gas Co.*, 317 U. S. 456, at page 467, the court said:

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[1]*Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U. S. 498, 502-503; *Federal Trade Commission* v. *Bunte Bros., Inc.*, 312 U. S. 349, 351, 352, 355.

"It is clear, as the legislative history of the Act amply demonstrates, that Congress meant to create a comprehensive scheme of regulation which would be complementary in its operation to that of the states, without any confusion of functions. The Federal Power Commission would exercise jurisdiction over matters in interstate and foreign commerce, to the extent defined in the Act, and local matters would be left to the state regulatory bodies. Congress contemplated a harmonious, dual system or regulation of the natural gas industry—federal and state regulatory bodies operating side by side, each active in its own sphere. * * *"

In *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591, at pages 612-613, the court said:

"We do not mean to suggest that Congress was unmindful of the interests of the producing states in their natural gas supplies when it drafted the Natural Gas Act. As we have said, the Act does not intrude on the domain traditionally reserved for control by state commissions; and the Federal Power Commission was given no authority over 'the production or gathering of natural gas.' Section 1(b). In addition, Congress recognized the legitimate interests of the States in the conservation of natural gas. By Section 11 Congress instructed the Commission to make reports on compacts between two or more States dealing with the conservation, production and transportation of natural gas. The Commission was also directed to recommend further legislation appropriate or necessary to carry out any proposed compact and 'to aid in the conservation of natural-gas resources within the United States and in the orderly, equitable, and economic production, transportation, and distribution of natural gas.' Section 11(a). Thus Congress was quite aware of the interests of the producing states in their natural gas supplies. * * *"

In *Interstate Natural Gas Co.* v. *Federal Power Commission*, 331 U. S. 682, at page 690, the court said:

"* * * As was stated in the House Committee report, the 'basic purpose' of Congress in passing the Natural Gas Act was 'to occupy this field in which the Supreme Court has held that the States may not act.' In denying the Federal Power Commission jurisdiction to regulate the production or gathering of natural gas, it was not the purpose of Congress to free companies such as petitioner from effective public control. The purpose of that restriction was, rather, to preserve in the States powers of regulation in areas in which the States are constitutionally competent to act. Thus the House Committee Report states: 'The bill takes no authority from State Commissions, and is so drawn as to complement and in no manner usurp State regulatory authority * * *.' *Clearly, among the powers thus reserved to the States is the power to regulate the physical production and gathering of natural gas in the interests of conservation or of any other consideration of legitimate local concern. It was the intention of Congress to give the States full freedom in these matters. Thus, where sales, though technically consummated in interstate commerce, are made during the course of production and gathering and are so closely connected with the local incidents of that process as to render rate regulation by the Federal Power Commission inconsistent or a substantial interference with the exercise by the State of its regulatory functions, the jurisdiction of the Federal Power Commission does not attach.* * *" (Emphasis supplied).

In *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission*, 332 U. S. 507, at pages 517-520, this court said:

"Moreover, this unusual legislative precision was not employed with any view to relieving or exempting any segment of the industry from regulation. The Act, though extending federal regulation, had no purpose or effect to cut down state power. On the contrary, perhaps its primary purpose was to aid in making state regulation effective, by adding the weight of federal regulation to supplement and reinforce it

in the gap created by the prior decisions. The Act was drawn with meticulous regard for the continued exercise of state power, not to handicap or dilute it in any way. * * *" (p. 517).

"It would be an exceedingly incongruous result if a statute so motivated, designed and shaped to bring about more effective regulation, and particularly more effective state regulation, were construed in the teeth of those objects, and the import of its wording as well, to cut down regulatory power and to do so in a manner making the states less capable of regulation than before the statute's adoption. Yet this, in effect, is what appellant asks us to do. For the essence of its position, apart from standing directly on the commerce clause, is that Congress by enacting the Natural Gas Act has 'occupied the field,' *i. e.*, the entire field open to federal regulation, and thus has relieved its direct industrial sales of any subordination to state control.

"The exact opposite is the fact. Congress, it is true, occupied a field. But it was meticulous to take in only territory which this Court had held the states could not reach. * * *" (p. 519).

"The Natural Gas Act created an articulate legislative program based on a clear recognition of the respective responsibilities of the federal and state regulatory agencies. *It does not contemplate ineffective regulation at either level.* We have emphasized repeatedly that Congress meant to create a comprehensive and effective regulatory scheme, complementary in its operation to those of the states and in no manner usurping their authority. * * *" (Emphasis supplied) (p. 520).

In *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U. S. 498, at pages 509-513, the court said:

"* * * The legislative history of this Act is replete with evidence of the care taken by Congress to keep the power over the production and gathering of

gas within the states. This probably occurred because the state legislatures, in the interests of conservation, had delegated broad and elaborate power to their regulatory bodies over all aspects of producing gas. The Natural Gas Act was designed to supplement state power and to produce a harmonious and comprehensive regulation of the industry. Neither state nor federal regulatory body was to encroach upon the jurisdiction of the other. Congress enacted this Act after full consideration of the problems of production and distribution. It considered the state interests as well as the national interest. It had both producers and consumers in mind. Legislative adjustments were made to reconcile the conflicting views."

In *Phillips Petroleum Co. v. Wisconsin*, 347 U. S. 672, at page 678, the court said:

"* * * Similarly, in *Colorado Interstate Gas Co. v. Federal Power Com.*, 324 U. S. 581, 598, 89 L. Ed. 1206, 1220, 65 S. Ct. 829, we stated that '*transportation and sale do not include production or gathering,*' and indicated that the 'production or gathering' exemption applies to the physical activities, facilities, and properties used in the production and gathering of natural gas. * * *" (Emphasis supplied).

Is an *amicus curiae* justified in ignoring those cases?

C. This Court Had in No Instance Held (Pre-1938) That the States Could "Not Act" by Reason of the Commerce Clause in the Field of Production and Conservation of Gas, but Had, on the Contrary, Approved State Action Such As Involved Herein.

On pages 32 and 33 of its brief in footnote 13, it is argued that under this court's pre-1938 interpretation of the Commerce Clause (Const., Art. I, Sec. 8) the state could not have used price as a conservation measure. Why could it not?

By 1938, the efforts of the states to protect the public interest in the fields of conservation, prevention of waste and protection of correlative rights in underground reservoirs were highly successful and were exercised without unsurmountable constitutional or practical difficulties.[2] These successful efforts included limitations on the wasteful and extravagant end use of gas.[3]

Local power was both constitutionally and practically adequate for these purposes, while, on the other hand, it is difficult or impossible to imagine federal legislation which would successfully deal with such problems under the many diverse and varied local conditions existing in natural underground reservoirs. There is no federal counterpart of state regulatory agencies in this field.

On the other hand, many of the pre-1938 efforts of the states to protect consumers against exploitation at the hands of interstate natural gas companies through regulation of their rates had become thwarted because of constitutional limitations imposed by the Commerce Clause.[4]

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[2]*Ohio Oil Co.* v. *Indiana*, (1900) 177 U. S. 190; *Lindsley* v. *Natural Carbonic Gas Co.*, (1911) 220 U. S. 61; *Walls* v. *Midland Carbon Co.*, (1920) 254 U. S. 300; *Bandini Petroleum Co.* v. *Superior Court*, (1931) 284 U. S. 8; *Champlin Refining Co.* v. *Corporation Commission*, (1932) 286 U. S. 210; *Henderson* v. *Thompson*, (1937) 300 U. S. 258; *Thompson* v. *Consolidated Gas Utilities Corp.*, (1936) 300 U. S. 55. Cf. *Sterling* v. *Constantin*, (1932) 287 U. S. 378.

[3]*Walls* v. *Midland Carbon Co.*, (1920) 254 U. S. 300; *Henderson* v. *Thompson*, (1937) 300 U. S. 258.

[4]*Missouri ex rel. Barrett* v. *Kansas Natural Gas Co.*, (1924) 265 U. S. 298; *Public Utilities Commission* v. *Attleboro Steam and Electric Co.*, (1927) 273 U. S. 83; *State Corp. Comm.* v. *Wichita Gas Co.*, (1934) 290 U. S. 561; *Peoples Natural Gas Co.* v. *Public Service Comm.*, (1926) 270 U. S. 550. For a summary of the decisions see *Illinois Natural Gas Co.* v. *Central Illinois Public Service Co.*, 314 U. S. 498, 503-506; *Interstate Natural Gas Co.* v. *Fed-*

As a practical matter it was difficult or impossible for the states to cope in this field of regulation with pipeline combinations whose operations were beyond the reach of effective local regulation.[5]

The pre-1938 "power" of the states which the Natural Gas Act "had no purpose or effect to cut down" and which it was not "to handicap or dilute * * * in any way"[6] and the "authority" of state commissions which it was not designed to "usurp"[7] included both (1) power and authority theretofore successfully exercised by the states in the *rate* regulation of sales[8] and (2) power and authority theretofore successfully exercised by the states and approved by this court in the fields of *conservation, prevention of waste,* and *protection of correlative rights* in underground reservoirs.[9]

In the first mentioned field of rate-maknig, some state action had been held invalid by reason of the Commerce Clause,[10] but some had been upheld.[11] It was in this field

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eral Power Comm., 331 U. S. 682, 689-690; *Panhandle Eastern Pipe Line Co.* v. *Public Service Comm.*, 332 U. S. 507, 514-515; *Federal Power Comm.* v. *Panhandle Eastern Pipe Line Co.*, 337 U. S. 498, fn. 15, p. 509; *Federal Power Commission* v. *East Ohio Oil Co.*, 338 U. S. 464, 470-474.

[5]*Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591, 610.

[6]*Panhandle Eastern Pipe Line Co.* v. *Public Service Commission*, 332 U. S. 507, 517-518.

[7]*Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591, 610; *Interstate Natural Gas Co.* v. *Federal Power Commission*, 331 U. S. 682, 690.

[8]*Public Utilities Comm.* v. *Landon*, (1919) 249 U. S. 236; *Pennsylvania Gas Co.* v. *Public Service Commission*, (1920) 252 U. S. 23; see *Peoples Natural Gas Co.* v. *Public Service Comm.*, (1926) 270 U. S. 550.

[9]Examples of the exercise of such state power and authority approved by this court before 1938 are set forth in note 2, *supra*.

[10]See note 4, *supra*.

[11]See note 8, *supra*.

that a "gap" existed and the cases delineating the gap are traditional rate cases construing the Commerce Clause.[12]

But no state action in the last mentioned fields had ever been held invalid by this court by reason of the Commerce Clause.[13] In this "field" of conservation, prevention of waste, and protection of correlative rights of producers and landowners, the court had never "held that the states may not act."[14]

In addition, many pre-1938 cases held that occupation and severance taxes based upon the value of the product which was destined for interstate commerce were perfectly valid and that a state's police power is as broad as its taxing power.[15]

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[12]Cases in notes 4 and 8, *supra*.

[13]At least two cases held, on the contrary, that state action in this field is not in violation of the Commerce Clause. *Champlin Refining Co.* v. *Corporation Commission*, (1932) 286 U. S. 210; *Thompson* v. *Consolidated Gas Utilities Corp.*, (1936) 300 U. S. 55, at 77. In the latter case, however, the court found that the order violated substantive due process requirements and that it did not achieve its purported purposes of prevention of waste or protection of correlative rights. The only other pre-1938 decision striking down state action in this field was *Sterling* v. *Constantin*, (1932) 287 U. S. 378, where the court, while approving the right of a state to conserve and prevent waste, held that there was no military necessity shown which justified declaration of martial law.

[14]"The basic purpose of the present legislation is to occupy this field in which the *Supreme Court has held that the States may not act.*" (Emphasis supplied to Committee Report quoted in footnote 4; *Illinois Nat. Gas Co.* v. *Central Ill. Public Service Comm.*, 314 U. S. 349, 506, and *Interstate Natural Gas Co.* v. *Federal Power Comm.*, 331 U. S. 682, 690.

[15]*Kidd* v. *Pearson*, 128 U. S. 1 at p. 26; *Mountain Timber Co.* v. *Washington*, 243 U. S. 219 at p. 238; *Parker* v. *Brown*, 317 U. S. 341, 367. The relevance of tax cases as a pre-1938 test in this field is demonstrated by *Champlin Refining Co.* v. *Corporation Comm.*, 286 U. S. 210 at 235.

The only authority relied upon by the Commission in support of its contention that under the pre-1938 interpretation of the constitution the state had no power to use minimum price orders as a conservation measure, is *Phillips Petroleum Co.* v. *Wisconsin*, 347 U. S. 672 at page 684. The case is certainly no authority for that contention. What the court said on page 684 must be read in conjunction with what preceded it on the same and the preceding page. The court there said:

> "* * * There can be no dispute that the overriding congressional purpose was to plug the 'gap' in regula-

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Conservation case:

Lacoste v. *Department of Conservation*, (1923) 263 U. S. 545 (severance tax on wild animals and alligators as *conservation measure*, based upon value of skins or hides, entire product moving in interstate commerce).

> "It is within the power of the state to impose the exaction as a condition precedent to the divesture of its title and to the acquisition of private ownership. * * * The state's power to tax property is not destroyed by the fact that it is intended for and will move in interstate commerce." (263 U. S. at pp. 550-551).

Tax cases:

Heisler v. *Thomas Colliery Co.*, (1922) 260 U. S. 245 (tax upon anthracite coal based upon value of product when prepared for shipment.)

Oliver Iron Mining Co. v. *Lord*, (1922) 262 U. S. 172 (tax upon mining of iron ore intended for interstate commerce).

> "Its (local) character in this regard is intrinsic, is not affected by the intended use or disposal of the product, is not controlled by contractual engagements, and persists even though the business be conducted in close connection with interstate commerce. * * *
>
> "* * * The tax may indirectly and incidentally affect such commerce, just as any other taxation of railroad and telegraph lines does, but this is not a forbidden burden or interference." (262 U. S. 178, 179).

Hope Natural Gas Co. v. *Hall*, (1927) 274 U. S. 284 (tax on production of natural gas based upon wellhead value).

tion of natural-gas companies resulting from judicial decisions prohibiting, on federal constitutional grounds, state regulation of many of the interstate commerce aspects of the natural-gas business. A significant part of this gap was created by cases holding that 'the regulation of wholesale *rates* of gas and electrical energy moving in interstate commerce is beyond the constitutional power of the States.' *Interstate Natural Gas Co.* v. *Federal Power Com., supra* (331 U. S., at 689). The committee reports on the bill that became the Natural Gas Act specifically referred to two of these cases and to the necessity of federal regulation to occupy the hiatus created by them. Thus, we are satisfied that Congress sought to regulate wholesales of natural gas occurring at both ends of the interstate transmission systems." (347 U. S. 683-684, emphasis supplied).

The "gap" was the States' lack of authority over gas moving in interstate commerce in general and over interstate *rates* in particular. But there was no gap consisting of lack of authority over conservation. As we have shown, the States had been exercising such power even to the extent of limiting end use of gas.[16] The exercise of conservation authority by the States had been upheld as against attacks based upon the Commerce Clause, because the regulation was of a local incident preceding interstate movement.[17] Certainly the gap thought to exist must not have been inconsistent with *Thompson* v. *Consolidated Gas Utilities Corp.*, (1936) 300 U. S. 55, since that was the most recent decision upon the subject. The court there stated

[16] *Walls* v. *Midland Carbon Co.*, (1920) 254 U. S. 300; *Henderson* v. *Thompson*, (1937) 300 U. S. 258.

[17] *Lacoste* v. *Department of Conservation*, (1923) 263 U. S. 545; *Champlin Refining Co.* v. *Corporation Commission*, (1932) 286 U. S. 210.

what was *not* included in the "gap" in the following language (300 U. S. at pages 76-77):

> "* * * Either production greater than the demand or *use for an inferior purpose* would necessarily involve overground waste of gas. The manner, place, or extent of production might lead to underground waste. We assume that the prohibition of *any wasteful conduct*, whether primarily in behalf of other owners of gas in the common reservoir, or because of the public interests involved, is consistent with the Constitution of Texas and that of the United States, and that to prevent waste production may be prorated. We assume, also, that the State may constitutionally prorate production in order to prevent undue drainage of gas from the reserves of well owners lacking pipe line connections. If proration were lawfully applied for any such purposes, the fact that thereby other private persons would incidentally and gratuitously obtain important benefits would present no constitutional obstacle. And the fact that plaintiffs' gas is to be sold in interstate commerce would not preclude such exercise of the State's power. Compare Champlin Ref. Co. v. Corporation Commission, 286 U. S. 210, 235. * * *". (Emphasis supplied).

Kansas here asserts no regulatory authority over interstate sales. It asserts only the power of conservation of its natural resources by imposing conditions upon severance. The exercise of that power has an effect upon interstate rates subject to Federal regulation, just as the Kansas severance tax has such an effect. Knowing that State conservation authority would have an effect upon interstate rates, Congress chose to leave all regulatory power over production in the hands of the States rather than entrusting it to the Federal Power Commission. This court has concisely stated the extent of Federal and State regulatory authority in *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U. S. 498 at page 506:

"* * * The primary duty of the Commission is to fix just and reasonable rates for the transportation and sale of natural gas in interstate commerce for resale. For this purpose the Court permitted the Commission to examine and consider the cost of production and gathering. *The use of such data for rate making is not a precedent for regulation of any part of production or marketing.* Before the Colorado Interstate decision, it was apparent that the value of producing facilities and the cost of gas bought by a natural-gas company from producers would be weighty factors in rate making whether a rate-base method or other method for fixing rates was used. Low valuation by the Commission of producing properties or low-cost allowance for purchased gas discourages exploration for gas or its sale in interstate commerce. *Congress knew this necessary relationship between production and distribution but excluded the Commission from exercising any direct control or regulation over the actual production and gathering of natural gas.*" (Emphasis supplied).

On page 33 of its brief the Federal Power Commission urges that the imposition of price-affecting conditions upon the production of natural gas which is to be sold in interstate commerce is an interference with the right of the Federal Government to regulate sales in interstate commerce. But that is exactly the method of conservation which was approved, as against the Commerce Clause, by this court in the pre-1938 decision of *Lacoste* v. *Department of Conservation*, (1923) 263 U. S. 545, *supra*.

In support of its contention the Federal Power Commission relies upon *Toomer* v. *Witsell*, (1947) 334 U. S. 385 (Brief 33). That case involved regulation by South Carolina of commercial shrimp fishing within the three mile coastal limit. The court there said (334 U. S. at 394-395):

"Nor does the statute violate the commerce clause. It does not discriminate against interstate commerce

in shrimp, and the taxable event, the taking of shrimp, occurs before the shrimp can be said to have entered the flow of interstate commerce."

As we read the decision it is squarely against the contention of the Federal Power Commission.

D. The Kansas Order Acts Alike upon Production Intended for Either Intrastate or Interstate Commerce, Without Any Differing Treatment or Reference with Regard Thereto.

Reliance is also placed upon *Foster-Fountain Packing Company* v. *Haydel*, 278 U. S. 1 (Brief 33). That decision was analyzed by this court in *Bayside Fish Flour Co.* v. *Gentry*, (1935) 297 U. S. 422, at page 426, in the following language:

"* * * There an act of the State of Louisiana forbade exportation of shrimp from which the heads and hulls or shells had not been removed. The ostensible purpose of the act was to conserve the raw shells for local use. The bill and affidavits in support of it, however, demonstrated, we held, that this purpose was feigned, and that the real purpose was to prevent the shrimp from being moved as theretofore from Louisiana to a point in Mississippi, where they were packed or canned and sold in interstate commerce, and thus through commercial necessity to bring about the removal of the packing and canning industries from Mississippi to Louisiana. The Louisiana act authorized every part of the shrimp to be shipped and sold in interstate commerce. We held that the state might have retained the shrimp for use and consumption therein; but, having fully permitted shipment and sale outside the state, those taking the shrimp under the authority of the act became entitled to the rights of private ownership and the protection of the commerce clause. * * *"

But the Kansas order acts alike upon *production* intended for either interstate or intrastate use. It is a conservation order such as that upheld in pre-1938 *Bayside Fish Flour Co.* v. *Gentry.*

E. Amicus Curiae Would Create Two New Gaps in the Face of a Congressional Intent to Create a Comprehensive Scheme of Regulation Complementary to That of the States.

In footnote 12, page 31, of its brief the Federal Power Commission quotes from *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591, in support of a contention that the Natural Gas Act *"prohibits the use of price as a conservation measure."* As applied to the authority of the Federal Power Commission, which was the only subject before the court, the statement is correct. As applied to the power of the several States, the statement is erroneous.[18] In the quotation it is plainly stated that the act

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[18]The Kansas legislature, in enacting the statute regulating the production and conservation of natural gas, pursuant to which the Kansas order was made, provided specific legislative standards or guides which govern the Kansas Commission in conserving gas, preventing waste, and protecting correlative rights. Thus G. S. Kan. 1949, 55-702, defines waste in detail and 55-703 requires the prevention of current or ultimate disproportionate production, the prevention of inequitable or unfair taking and the prevention of discrimination in production.

Congress did not, in the Natural Gas Act, provide any standards or guides to achieve such purposes. The sole legislative rate-making standards supplied the Federal Power Commission are contained in Sections 4(a) and 5(a). 52 Stat. 822, 823, 15 U. S. C., Secs. 717c(a) and 717d(a). By establishing therein a legislative standard of "just and reasonable" rates, the Congress was taking into account well-recognized utility rate-making principles. The Act provided "for regulation along recognized, more or less standardized lines" and there was "nothing novel in its

would have to be redesigned to confer any such power *upon the Commission.*

It seems to us that the contentions of the Federal Power Commission advanced in footnotes 12 and 13 (pp. 31 and 32) are in conflict. This court has pointed out in many cases that the purpose of the Natural Gas Act was to complement the state authority to the end that there should be no gap in regulatory authority[19] and this is the gist of

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provisions". *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591, 616. Sections 4(a) and 5(a) "contain only the conventional standards of rate-making". *Ibid.* This was the basis for the court's rejection of West Virginia's plea for recognition in federal rate-making of the relationship between price and use or price and conservation, a plea which the court found, injected "into a rate case, a 'novel' doctrine which has no express statutory sanction". *Ibid.* The court recognized the legitimate relationship between price, end use and conservation, but held that the use of that relationship as a tool by the Federal Power Commission would require that "the Act must be further amended". *Ibid.*, at 617. The Court stated further in *Colorado Interstate Gas Co.* v. *Federal Power Commission*, 324 U. S. 581, at 602, that "when Congress designed this Act it was thinking *in terms of the ingredients of a rate base,*" and the Act "contained explicit provisions which describe *"the normal conventions of rate making."*

Since Congress did not provide the Federal Power Commission with the standards of conservation or protection of correlative rights or the tools with which to operate in that area, and since the Act had no purpose to "cut down", "handicap", "dilute" or "usurp" any constitutional power or authority of the states, it is apparent that Congress intended that the public interest in conservation and protection of correlative rights continue to be safeguarded by the states through the use of all constitutional methods available to them, including reasonable controls over wasteful uses.

[19]*Public Utilities Co.* v. *United Fuel Gas Co.*, 317 U. S. 456 at 467; *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591 at pp. 607-610, 612-615; *Interstate Natural Gas Co.* v. *Federal Power Commission*, 331 U. S. 682 at pp. 690-691; *Panhandle*

footnote 13. But returning to footnote 12 we find that the Federal Power Commission contends that there is a gap consisting of lack of authority upon the part of either the Commission or the States to use price as a conservation measure. But that no such construction was intended may be demonstrated by simply continuing from the point when the Federal Power Commission ended its quotation from *Federal Power Commission* v. *Hope Natural Gas Co.* The opinion continues:

> "It is hardly necessary to add that a limitation on the net earnings of a natural gas company from its interstate business *is not a limitation on the power of the producing state either to safeguard its tax revenues from that industry or to protect the interests of those who sell their gas to the interstate company.*" (320 U. S. at 614).

If the Federal Power Commission's construction be correct, the Natural Gas Act signally failed of its purpose and filled one gap only at the expense of creating two others—lack of conservation authority and lack of authority to protect correlative rights.[20] In sharp contrast to such a construction is the court's construction—"The Natural Gas Act created an articulate legislative program based on a clear recognition of the respective responsibilities of the federal and state agencies. It does not contemplate ineffective regulation at either level."[21]

Eastern Pipe Line Co. v. *Public Service Commission*, 332 U. S. 507, at pp. 517-520; *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U. S. 498 at pp. 509-513.

[20]The record is replete with evidence that minimum price is the fairest and most effective conservation measure and that it is the only effective method of protecting correlative rights in the Kansas Hugoton Field. See notes 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 41 and 43 in appellees' brief.

[21]*Panhandle Eastern Pipe Line Co.* v. *Public Service Commission*, 332 U. S. 507, at p. 520.

F This Case Does Not Hinge on a Determination As to Whether or Not the Federal Power Commission Has Jurisdiction over Wellhead Sales in Interstate Commerce.

The reason that by far the greatest portion of the brief of the Federal Power Commission does not reach the issues of this case is apparent. The first question sought to be presented (p. 2) is "whether sales of natural gas in interstate commerce for resale, made at the wellhead or prior to the completion of gathering, are subject to regulation by the Federal Power Commission under the Natural Gas Act." This is a question involved in two other causes now pending in this Court on petitions for certiorari.[22] It is also the question involved in another recent case to which *amicus curiae* here is a party.[23] This question also appears to be involved in various press releases and examiner's Federal Power Commission and court decisions referred to in Appendix A to the *amicus* brief.

But the question is not involved in this case and the Federal Power Commission must look to other causes for guidance in its efforts to find the answer to it.

The Kansas order involved here is not a rate order and was not entered in a rate proceeding.[24] As we have demonstrated, it is an order regulating severance or production only. The Federal Power Commission in its brief

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[22]*Shell Oil Company* v. *Federal Power Commission*, No. 449, October, 1957, Term, and *Humble Oil and Refining Company* v. *Federal Power Commission*, No. 459, October, 1957, Term.

[23]*Saturn Oil and Gas Company, Inc.*, v. *Federal Power Commission*, C. A. 10, No. 5582, November, 1957, Term, decided November 20, 1957, opinion attached as Appendix B to the brief *amicus curiae*, pp. 47-62.

[24]Finding 7, R. 42.

completely ignored the considerable number of pre-1938 decisions of this Court dealing with the jurisdiction of *states* to enter such an order.[25]

Kansas has not, at this point in the history of its state regulation, assumed jurisdiction over the wellhead sales of gas. This is not a proceeding under the Kansas utility statutes[26] governing such matters. Price fixing remains in private hands, unless the cases on which the Federal Power Commission relies are finally determined to be the law, in which event price-fixing will be in other public hands. Price-fixing whether done privately, or whether done by the Federal Power Commission under the Natural Gas Act, or whether done by the State of Kansas under its utility jurisdiction, will continue to be done regardless of the outcome of this case. So far as the Kansas order here involved is concerned, it matters not who is to do the price-fixing.

Conservation and the protection of correlative rights under the Kansas order requires only the recognition of a minimum value for gas as a condition of severance. As such, it conditions the use and disposition of gas precisely in the same manner as such use and disposition was conditioned by traditional state statutes and orders which prevented production unless proration, ratable take, gas-oil ratio, cycling, repressuring, and other end use requirements (including end-use requirements designed to prevent economic waste) were met.

We have pointed out elsewhere[27] and in this brief that

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[25]See cases in notes 2 and 15.

[26]Chapter 66, General Statutes of Kansas, 1949, "Public Utilities".

[27]Appellee's Motion to Dismiss or Affirm, pp. 37-39.

the Kansas Corporation Commission, acting in its capacity as a conservation body pursuant to the Kansas Statutes regulating the production and conservation of natural gas[28] and the Federal Power Commission, acting as a rate-making commission having jurisdiction of utilities under the Natural Gas Act, are not rivals competing with each other in the same field of endeavor, but are complementary instrumentalities having their own separate duty to effectuate differing legislative ends. If Kansas should, under its police power in the field of utility regulation,[29] attempt to assume jurisdiction over wellhead sales of gas, then the conflict envisioned by the Federal Power Commission would be present. But a final determination that the Federal Power Commission has jurisdiction over wellhead sales of gas in interstate commerce will not prevent Kansas from the exercise of this conservation power, unless in another proceeding and at another time, Federal Power Commission action should become "inconsistent or a substantial interference" with the state's "regulatory functions" concerning production and conservation of this natural resource, in which event, at that time and place, "the jurisdiction of the Federal Power Commission does not attach."[30]

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[28]Article 7, Chapter 55, General Statutes of Kansas, 1949, Appendix "A" to Brief of Appellant.

[29]Chapter 66, General Statutes of Kansas, 1949.

[30]*Interstate Natural Gas Co.* v. *Federal Power Commission*, 331 U. S. 682, at 690. That section of the Federal Power Commission's series of "174" orders which followed the decision of this court in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U. S. 672 (see F. P. C. brief, p. 14) having to do with abandonment of service, provides as follows:

> "Provided, however, that nothing herein shall be construed as interfering with or is intended to interfere with or to prevent compliance by a natural gas company with valid conservation orders of a state agency relating to the production or gathering of natural gas." (18 C. F. R., Sec. 157.30).

G. Conclusion.

The judgment below should be affirmed.

Respectfully submitted,

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Thus the Federal Power Commission itself has assured that there will be no inconsistent action or interference by it in the area reserved to the states and has recognized the paramount power of the states in the event of conflict.

Other specific recognition by the Federal Power Commission of conditions imposed upon production by the Kansas order is shown by the fact that, under its series "174" orders, the Federal Power Commission, in each and every instance involving sale of gas resulting from production in the Kansas Hugoton Field, has accepted for filing effective and applicable rate schedules incorporating the Kansas order and establishing rates of not less than eleven cents (See Note I; Federal Power Commission Brief, p. 13 for an example).